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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BENJAMIN ADAM BARTOLI,

Defendant and Appellant.

E052540

(Super.Ct.Nos. RIF153278 &
RIF153291)

OPINION

APPEAL from the Superior Court of Riverside County. Raymond C. Youngquist, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Robert Booher, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Lilia E. Garcia, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Benjamin Adam Bartoli guilty of three counts of robbery (Pen. Code, § 211, counts 1, 11, 13);¹ eight counts of second degree burglary (§ 459, counts 2, 3, 5, 7, 9-10, 12, 14); and three counts of attempted robbery (§§ 664, 211, counts 4, 6, 8). As a result, he was sentenced to a total term of eight years four months in state prison with credit for time served.

On appeal, defendant contends that the trial court misunderstood its sentencing discretion and, therefore, the matter should be remanded for a resentencing hearing. In the alternative, he claims that his counsel was ineffective for failing to object to the trial court's misunderstanding at the time of the sentencing hearing. We reject these contentions and affirm the judgment.

I

FACTUAL BACKGROUND

A. *Counts 1 (Robbery) and 2 (Burglary of Pharmacy)*

Kevin Pidgeon owned and worked as a pharmacist at the Palmieri Pharmacy in Corona. On September 22, 2009, around 11:00 a.m., a White male, identified as defendant, wearing a cap, big mirrored sunglasses, and bandages on his cheek and chin, walked into the pharmacy through the back door entrance. Pidgeon asked defendant how he could help him, and defendant replied that he was waiting for his doctor to call in a prescription.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

After about 30 minutes, Pidgeon asked defendant for his doctor's name and telephone number; however, defendant was unable to provide the information.

Defendant subsequently left and returned 30 to 45 minutes later. Pidgeon informed defendant that his doctor still had not called, and he asked defendant how he could help to speed up the process. Defendant waited around in the pharmacy for over an hour, making Pidgeon feel nervous.

After being in the store for about four to five hours, defendant walked up to the pharmacy counter and handed Pidgeon a note. The note stated, "OxyContin, 80 milligrams, 60, 40, et cetera, put in a bag." Defendant told Pidgeon, "[D]o this for me now." Pidgeon, who was afraid, believed that he was being robbed and complied with defendant's demand. He went to the safe and took two bottles of the drug out. On his way back toward defendant, he pushed a silent alarm button. He then put the two bottles in the bag and gave it to defendant.² Pidgeon estimated the value of the two bottles of OxyContin to be about \$1,600.

B. *Count 3 (Burglary of CVS)*

On October 1, 2009, Mai Doan, was working as a pharmacist for a CVS store on Riverside Avenue, when around 8:30 p.m., she encountered a White male in his 30's wearing sunglasses, a baseball cap, and numerous bandages on his cheeks and chin. The man placed a handwritten note on the counter in front of Doan. The note said, "put

² A surveillance video depicting defendant's presence at the pharmacy was played for the jury at the time of trial.

OxyContin in a bag.” Doan was scared and told the man that he needed a prescription. The man subsequently left.³

C. *Counts 4 (Attempted Robbery) and 5 (Burglary of 6600 Magnolia Walgreens)*

On October 1, 2009, Charles Tran was working as a pharmacy manager at a Walgreens on Magnolia Avenue in Riverside when, around 8:50 p.m., a White male in his early 30’s with bandages on the side of his face and chin and wearing a baseball cap approached him at the consultation window. The male, identified as defendant at trial, handed Tran a handwritten note that said, “something like put OxyContin, 80 and 40, in a bag and hand it out.” Defendant also told Tran to “hurry up[,] I need to move on.”

Tran was nervous, but did not give defendant the drug. Instead, Tran pretended to open a safe and told his technician to come see him. Once the technician was near him, they both exited a back door and called the police. When Tran walked back into the pharmacy, defendant was gone.

D. *Counts 6 (Attempted Robbery) and 7 (Burglary of Limonite Walgreens)*

On October 1, 2009, Diana Hermano was working as a pharmacist for Walgreens on Limonite Avenue when, around 10:00 p.m., a White male wearing a baseball cap, long-sleeved shirt, and sunglasses with bandages on his left cheek and chin attempted to rob Hermano. He handed her a note that said, “place OxyContin 80 milligrams in a bag now.” After Hermano told defendant to give her a minute, she walked away and called

³ Doan was unable to identify defendant as the suspect at trial. The store surveillance video of the incident was played for the jury.

the front desk. She informed the front person that she was being robbed and to call the police. The man thereafter waved at her and left without taking the OxyContin.⁴

E. *Counts 8 (Attempted Robbery) and 9 (Burglary of Limonite Rite-Aid)*

On October 1, 2009, around 10:15 p.m., a man with a big bandage on the right side of his face and wearing a baseball cap and sunglasses walked into a Rite-Aid store on Limonite Avenue and asked to speak to a pharmacist. Jill Hoang, who was working as the pharmacist on duty, met the man at the pick-up counter where he handed her a note that said, “put OxyContin in the bag for me.” Hoang informed the man that she did not have the medication and that she would need to order it for him. After Hoang gave the man his note back, he walked away.⁵

F. *Count 10 (Burglary of La Sierra Rite-Aid)*

On October 2, 2009, around 7:40 p.m., Kathleen Dinh was working as a pharmacist at the La Sierra Rite-Aid, when she saw a White male between the ages of 30 and 40 with beige duct tape on his face and wearing a cap and dark sunglasses lurking in front of the pharmacy. Dinh was called to the drop-off window, where she asked the man if he needed some help. The man slid Dinh a note that said, “OxyContin 40, 80, put it in a bag.” Dinh was scared. She pushed the note back to the man and told him the pharmacy did not stock the drug. The man picked up the note, said, “okay,” and then left

⁴ Hermano was unable to identify defendant as the suspect at trial. The store video surveillance of the incident was played for the jury.

⁵ Hoang did not recognize defendant as the suspect at the time of trial.

the store. Dinh subsequently called the police, and identified two people from some photographs.⁶

G. *Counts 11 (Robbery) and 12 (Burglary of 11110 Magnolia Walgreens)*

On October 2, 2009, around 8:10 p.m., a man wearing a big bandage on his face, a baseball cap, sunglasses, and long-sleeved shirt entered a Walgreens store on Magnolia Avenue in Riverside and handed a note to Son-Nam Ton, the pharmacist on duty. The note said, “give me your Oxy 60 and all of your . . . Oxy 60s, 80s, and you won’t get hurt.” Ton was scared and gave the man about 120 pills worth at least \$1,000. The man took the pills, said, “sorry,” and left.⁷ Ton called the police.

H. *Counts 13 (Robbery) and 14 (Burglary of Magnolia CVS)*

On October 10, 2009, around 8:02 p.m., a man wearing blue jeans, a black jacket, sunglasses, a baseball cap, and a big bandage on the right side of his face entered a CVS store on Magnolia Avenue in Riverside and handed Thanh Pham, the pharmacist on duty, a note. The note read, “OxyContin, 20, 40, 60 or 80.” Terrified, Pham complied with the man’s note, placed some bottles of the drug in a bag, and gave it to the man. Pham also called his clerk and told him to call the police. After grabbing the bag, the suspect left the store.

⁶ Because his face was covered up with the duct tape, Dinh was unable to identify defendant as the suspect at trial. The store video surveillance of the incident was played for the jury.

⁷ Ton was unable to definitely identify defendant as the suspect at trial. A store video surveillance of the incident was played for the jury.

The police later took Pham and his clerk down the street to try to make an identification of someone. Due to his mental state and because the suspect's face was covered, Pham, was unable to make an identification. The clerk however identified defendant as the person who robbed Pham; he also identified defendant as the suspect at the time of trial.

I. Defendant's Arrest

In October 2009, Riverside City Police Officer Eric Hibbard was notified that a White male, wearing a baseball cap, sunglasses, and bandages on his left cheek and chin was stealing OxyContin. The suspect was called the "Band-Aid Bandit." Officer Hibbard was given a description of the suspect and his vehicle.

On October 10, 2009, around 8:15 p.m., Officer Hibbard received a dispatch call about a robbery that had occurred, using the same modus operandi, at the CVS store on Magnolia Avenue. The description of the vehicle matched that of the "Band-Aid Bandit." With the assistance of other officers, Officer Hibbard stopped defendant's truck about two miles from the CVS store.

After defendant was placed in handcuffs, Officer Hibbard conducted a patdown search of defendant's person for weapons. The patdown search revealed a pill bottle containing OxyContin in defendant's front pant pocket. A search of defendant's vehicle revealed, among other items, four hats, a black buttoned-up shirt, a black long-sleeved shirt, a green long-sleeved shirt, a blue bandana, a glove, several hundred OxyContin pills inside a backpack, a first aid kit with gauze tape and bandages, gauze tape wadded up on the floorboard of the truck, sunglasses, and a bag from "Good Neighbor

Pharmacy.” The police also searched defendant’s residence and discovered empty pill bottles and two empty handgun containers in a safe.

II

DISCUSSION

Defendant contends that the trial court misunderstood its sentencing discretion by imposing consecutive rather than concurrent sentences for his convictions. He concedes that he did not object on the ground now stated at the time of the sentencing hearing, but claims that an objection was unnecessary. In the alternative, he argues that his counsel was ineffective for failing to alert the trial court of its misunderstanding.

The People respond that defendant forfeited his claim of error on appeal. The People also assert that his ineffective assistance of counsel claim is unmeritorious, since the record shows the trial court understood its sentencing discretion and correctly imposed consecutive terms.

A. *Additional Background*

Following a jury trial, defendant was found guilty of three counts of robbery (§ 211, counts 1, 11, 13); eight counts of second degree burglary (§ 459, counts 2, 3, 5, 7, 9-10, 12, 14); and three counts of attempted robbery (§§ 664, 211, counts 4, 6, 8).

Prior to sentencing, the trial court noted that there was a stipulation of the ranges of sentencing: the low term of seven years four months; the midterm of eight years four months; and the high term of 10 years four months. The trial court selected the midterm as follows: the midterm of three years on count 1 (robbery of Pidgeon); a consecutive term of eight months on count 3 (burglary of CVS); a consecutive term of eight months

on count 5 (burglary of Walgreens on 6600 Magnolia); a consecutive term of eight months on count 7 (burglary of Walgreens on Limonite); a consecutive term of eight months on count 9 (burglary of Rite Aid on Limonite); a consecutive term of eight months on count 10 (burglary of Rite Aid on La Sierra); a consecutive term of one year on count 11 (robbery of Ton); and a consecutive term of one year on count 13 (robbery of Phan). The remaining counts were ordered stayed pursuant to section 654. Defense counsel did not object to the trial court's imposition of consecutive terms.

The trial court explained that it imposed consecutive terms because of “the separate nature of the crimes committed,” and because the aggravating factors outweighed the mitigating factors. The trial court found the following factors in aggravation: the nature and circumstances of the crime were serious compared to other instances of the same crime (California Rules of Court, rule 4.414(a)(1));⁸ defendant inflicted physical or emotional injury in that several of the witnesses at trial appeared to be traumatized (rule 4.414(a)(4)); the degree of monetary loss was great (rule 4.414(a)(5)); the manner in which the crime was carried out demonstrated criminal sophistication or professionalism (rule 4.414(a)(8)); the crime involved a large quantity of contraband (rule 4.421(a)(10)); and defendant had engaged in violent conduct which shows a serious danger to society (rule 4.421(b)(1)). In mitigation, the trial court cited the following factors: defendant was neither armed with nor used a weapon (rule 4.414(a)(2)); defendant's prior record of criminal conduct does not indicate a pattern of

⁸ All further rule references are to the California Rules of Court unless otherwise indicated.

regular or increasingly serious conduct (rule 4.414(b)(1)); defendant is willing and has the ability to comply with the terms of probation (rules 4.414(b)(3) & 4.414(b)(4)); the likely effects of imprisonment on defendant are considered to be serious (rule 4.414(b)(5)); the adverse collateral consequences on defendant's life resulting from the felony conviction could be serious (rule 4.414(b)(6)); and defendant was remorseful (rule 4.414(b)(7)).

After defendant was sentenced, and at the conclusion of the sentencing hearing, the trial court stated: "For the record, the probation officer had recommended implicitly a denial [of probation] by saying the sentence should be three years. I don't know how she could get three years, you can't get there, so that wasn't much help to the Court; but, anyway, I believe I inferred what she was saying, but, anyway, that proves she was recommending state prison."

B. *Analysis*

Relying on the above comments by the trial court that the probation officer had recommended three years and "you can't get there," defendant argues that the trial court misunderstood the scope of its sentencing discretion when it imposed consecutive terms and, therefore, a remand is necessary despite a lack of objection by trial counsel. Citing our Supreme Court's decision in *People v. Scott* (1994) 9 Cal.4th 331, the People argue we should not consider defendant's arguments because he forfeited them by failing to object on this ground at the time of sentencing. We agree with the People.

In *People v. Scott, supra*, 9 Cal.4th at page 353, our Supreme Court decided that the waiver doctrine applies "to claims involving the trial court's failure to properly make

or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons. [¶] . . . Routine defects in the court’s statement of reasons are easily prevented and corrected if called to the court’s attention.” The waiver rule applies so long as the trial court gives the parties “any meaningful opportunity to object.” (*People v. Gonzalez* (2003) 31 Cal.4th 745, 752.) Here, the record clearly shows that defendant was given a meaningful opportunity to object, but failed to do so. Indeed, defendant does not claim otherwise. However, to forestall the ineffective assistance of counsel claim, we discuss the merits of defendant’s claim.

Defendant relies on the trial court’s comments concerning the probation officer’s recommendation of three years and statement that “you can’t get there” to support his contention that the trial court failed to recognize it had discretion to impose concurrent sentences. Absent a clear showing to the contrary, we presume that the sentencing court understood and properly exercised its discretion. (*People v. Galvaz* (2011) 195 Cal.App.4th 1253, 1264-1265; *In re Consiglio* (2005) 128 Cal.App.4th 511, 516.)

At the top of page 19 of the probation report, it states, “SENTENCING DATA.” Underneath that, it reads, “**Count I: (Principal)**.” Immediately thereafter, the probation report notes the circumstances in aggravation and mitigation as it relates to count 1. The probation report then states, “In weighing the factors in aggravation and mitigation, it appears the mid term of 3 years would be warranted, if the defendant is sentenced to State

Prison.” Following the above statement, the probation report concludes with the “probation officer’s statement.” The sentencing data section of the probation report fails to note sentencing for the remaining counts. Based on our analysis of the probation report, the trial court’s comments are more properly interpreted as a comment on the probation officer’s failure to address all the counts. This conclusion is supported by the fact that the robbery offense in count 1 carries a midterm sentence of three years. In addition, the probation officer’s concluding statement does not mention a sentence of three years.

Contrary to defendant’s contention, the record clearly shows that the trial court was aware of its discretion to impose concurrent sentences. When it imposed consecutive terms, the trial court stated, “And the reason the Court is giving consecutive sentences in this matter is the separate nature of the crimes committed, [and] the Court’s reasoning, call[s] for an imposition of consecutive sentences; and the factors in aggravation, as I said before, that I have stated on the denial of probation, apply equally to this situation.” There is no indication in the record to show that the trial court was not aware of its discretion or misunderstood its discretion to impose concurrent terms; rather, the trial court determined that consecutive terms were appropriate in this case. In addition, the trial court was careful to consider any and all viewpoints at the sentencing hearing. Moreover, the record shows that the trial court relied on proper factors in imposing consecutive sentences and properly stated reasons for imposing consecutive sentences.

III

DISPOSITION

The judgment is affirmed.

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RAMIRIZ
P. J.

We concur:

McKINSTER
J.

RICHLI
J.